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No. 97-992

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC.; DAVID AITKEN; JON BARAGA; CRAIG ELEY; JACK HAWKINS; LONNIE HAYNES; ALDEN KAUTZ; and BILL ORR, individually and as guardian of WILLIAM DAVID ORR,
Petitioners,
vs.
VICTORIA BUCKLEY, Individually, and as Secretary of State for the State of Colorado,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

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Victoria Buckley, Colorado Secretary of State, (hereinafter "Colorado") hereby responds to the Petition For Writ of Certiorari filed by the American Constitutional Law Foundation and the other petitioners (hereinafter "ACLF").

I. THE PORTION OF THE PETITION WHICH ASKS THE COURT TO REVIEW THE REQUIREMENT THAT PETITION CIRCULATORS MUST BE EIGHTEEN YEARS OF AGE SHOULD BE REVIEWED BY THE COURT.

Colorado is in the unusual position of agreeing with the ACLF that a portion of the petition should be granted. As background, it should be noted that Colorado has filed a petition for writ of certiorari regarding certain portions of the Tenth Circuit's decision. *Buckley v. American Constitutional Law Foundation*, 97-930. Colorado has asked this Court to determine whether a State may constitutionally regulate the process of circulating initiative petitions by requiring that (1) petition circulators who verify the signatures of petition signers must be registered electors; (2) petitioner circulators must wear identification badges; and (3) proponents of an initiative petition must file reports disclosing the amounts paid to circulators and the identity of the circulators. Incorporated within the question is the test which must be applied to determine whether the regulations are constitutional.

Colorado's petition gives this Court the opportunity to determine the parameters within which States may regulate the activities of petition circulators -- an area of law which calls for clarification by this Court. The age limitation raised by ACLF herein is also a regulation of petition circulators which has not previously been addressed by the Court. Granting review of ACLF's question will complete the factual picture, thereby helping to clarify this area of the law.

II. THE REMAINDER OF ACLF'S PETITION SHOULD BE DENIED.

A. THE INITIATIVE AND REFERENDUM ARE NOT GUARANTEED BY THE UNITED STATES CONSTITUTION.

ACLF asks this Court to find that the right to the initiative and referendum is a federal constitutional right grounded in the petition clause of the First Amendment. (Pet. 13-17). The scope of the petition clause has already been addressed by this Court.

The petition clause in the First Amendment addresses the right of the people to communicate with members of legislative bodies and other elected or public officials. *McDonald v. Smith*, 472 U.S. 479, 482 (1985). It does not encompass the right to bypass these individuals through the initiative and referendum. The authority to decide how the people of a State will govern themselves, including the means by which legislation is passed, rests with the people of each State. *Pacific States Tel. and Tel. v. Oregon*, 223 U.S. 118 (1912); L. Tribe, *American Constitutional Law*, section 5-24 (1988). *See also*, Hans Linde, *When is Initiative Lawmaking Not "Republican Government"?*, 17 Hastings L.Q. 159, 165 (1989). Thus, the implementation of the initiative and referendum remains the option of each State.

B. THE SAFETY CLAUSE DOES NOT IMPAIR THE CONSTITUTIONAL RIGHTS OF ACLF.

The ACLF claims that the State of Colorado robs it of its right to petition by attaching a safety clause to most legislative bills. (Pet. 21-26). This argument mischaracterizes Colorado law.

The Colorado Constitution grants to the people of Colorado the right of referendum, "except as to laws necessary for the immediate preservation of the public peace, health or safety, and appropriations for the support and maintenance of the department of state and state institutions". Colo. Const. art. V, § 1(2). Provisions of laws stating that the law is necessary for the immediate preservation of the public peace, health or safety are denominated "safety clauses." The inclusion of safety clauses is a matter left to the sole and absolute discretion of the Colorado General Assembly. *Van Kleek v. Ramer*, 62 Colo. 4, 156 P. 1108 (1916).

ACLF claims that the attachment of the safety clause inhibits its right to petition. This assertion is incorrect. Safety clauses only prohibit referenda. They do not prohibit initiatives. As noted by the Colorado Supreme Court, "although invoking the emergency language in the enactment precludes citizen referendum on the law, the initiative power is available to redress the concerns of the citizens of the state." *Cavanaugh v. State Department of Social Services*, 644 P.2d 1, 4 n.6 (Colo. 1982).

If the safety clause is attached, the law becomes effective even if an initiative petition containing the minimum number of signatures is presented to the

Secretary of State. If a safety clause is not attached, then citizens may circulate a referendum petition. If the petition contains sufficient signatures, then the law is held in abeyance until the people have voted. Colo. Const. art. V, § 1(2). The only difference between an initiative seeking to overturn a law and a referendum seeking overturn a law is whether the law will become effective pending the outcome of an election. Delaying the effective date of a law pending the result of an election does not implicate a constitutional right.

C. THE SIX MONTH LIMITATION ON THE CIRCULATION OF PETITIONS IS CONSTITUTIONAL.

Since 1919, Colorado has established a six-month time limit within which to circulate and present initiative petitions to the Secretary of State. The six-month period generally commences when the title has been set by the Title Setting Board. ACLF contends that the six-month time frame is unconstitutional. (Pet. 19-20). It apparently argues that Colorado may not set any time limit for the submission of an initiative or referendum petition. However, the ACLF concedes that Colorado has an important interest in requiring that the proponents of a petition show that the petition has a significant modicum of support before it is placed on the ballot. (Pet. 15) It does not contest the constitutional requirement that the petition must contain the signatures of registered electors equal to five percent of the vote cast at the last election for the office of Secretary of State.

The six-month limitation on the circulation of petitions is part and parcel of the demonstration of public support for the measure. It cannot be legitimately disputed that a petition which contains the required

number of signatures obtained over a six-month period has significantly more support than a petition which contains the required number of signatures obtained over a five-year period. Moreover, it cannot be assumed that the group of electors who sign a petition in one year will necessarily support the measure in subsequent years. As noted by the California Supreme Court, "as electors change each year, through death, coming of age, removal, neglect to qualify, and the like, any construction... which would permit the qualified electors of one year to largely determine the measure liable to go on the ballot in a subsequent year, would lead to confusion and uncertainty, and would be contrary to public policy." *Gage v. Jordan*, 142 P.2d 387, 392 (Cal. 1944).

Setting a time frame within which to collect signatures is a key element in determining whether the measure has a significant modicum of support. The establishment of a time frame is constitutional, and this Court should refrain from granting certiorari to review this question.

CONCLUSION

Colorado does not object to the review of the requirement that circulators must be eighteen years of age. Colorado does not believe that the other issues are worthy of review, and the Court should deny the petition as to those questions.[1]

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[1] ACLF mentions the circulator affidavit (Pet. 12) and asks the Court to declare the affidavit provision unconstitutional (Pet. 27). However, ACLF offers no legal reason for the Court to review the question.

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